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the receiver is in a position to fulfil that duty. But the question in the principal case is between the lessor and the lessee. The lessee also owes this public duty,[15] and as the lease is necessarily made with public authority[16] and the lessee assumes the obligation, his liability is primary. The receiver is appointed and operates on behalf of the lessee estate and the benefit to the lessor is incidental. Consequently, it is difficult to find a basis for the lessor's responsibility to the receiver.[17]

COMPARISON OF HANDWRITING. — The phrase "similitude" or "comparison of hands" was employed by the early judges to express their aversion for all handwriting testimony which involved a comparison between one piece of writing and another.[1] To the peculiar reverence manifested by later judges for this phrase must be traced the technical rules which obtained at common law wherever this sort of evidence was involved.[2] Where the comparison is made by the jury the lack of necessity for any such rules is clear, for the genuine writing offered in evidence[3] for comparison with the disputed writing differs on principle in no respect from ordinary circumstantial evidence. Yet in England it required a statute[4] definitely to settle the permissibility of such comparison, and in many American jurisdictions such comparison was either entirely forbidden or permitted only under various restrictions.[5]

The opinion of a witness as to the genuineness of a disputed writing in court, after comparison, should be admitted in the discretion of the court, which in all cases of opinion evidence should be extensive, if there

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[15] 1 ELLIOTT, RAILROADS, 2 ed., § 458. [16] *Ibid.* §§ 429, 430.

[17] *Cf.* Phinizy *v.* Augusta & Knoxville R. Co., 62 Fed. 771. See Brown *v.* Toledo, P. & W. R. Co., 35 Fed. 444, 445. But see Mercantile Trust Co. *v.* Farmers' Loan & Trust Co., 81 Fed. 254, 258. The broad ground discussed is not necessary to the decision in the principal case since there the intervening of the lessor gave assent to the receivership, and since the deficit was not caused by simply operating the road but by payments to protect the lessor's franchises. Moreover, the question might well be different if the lessee had no assets and the creditors of the receiver during the trial period were seeking to charge the lessor for their services in enabling the discharge of his public duty.

[1] For illustrations see Trial of Sir Richard Grahme, 12 How. St. Tr. 646, 735; King *v.* Crosby, 12 Mod. 72.

[2] Testimony by witnesses directly to the act of writing the words in dispute, and direct testimony to circumstances leading up or pointing back to that act, are merely ordinary illustrations of testimony from knowledge and involve no considerations peculiar to handwriting evidence.

[3] The theoretical objection to the introduction of all handwriting as a basis for comparison on the ground that, the question of genuineness being for the jury, it will tend to complicate the issues, is clearly untenable, since the genuineness of the document, like all preliminary questions of fact regarding the admissibility of evidence, should be determined as a preliminary matter by the court.

[4] 17 & 18 VICT. c. 125, § 27. This statute has been adopted in many American jurisdictions, frequently verbatim. Scotland and Ireland were excepted from the operation of this statute; but the same law was soon extended to Ireland. 19 & 20 VICT. c. 102, § 30.

[5] The reason for the great divergence in the American decisions is probably to be found in the fact that each jurisdiction, as it adopted a rule on the subject, tended to follow the prevailing English view, which went through several transformations. For the present state of the law in the various jurisdictions, see 3 WIGMORE, EVIDENCE, § 2016.

is present either of the reasons which usually justify the admission of opinion evidence. These are: first, the need by the jury of an expert expression of opinion because of the technicalities of the subject; or, second, the impossibility of stating the witness's information in such a way as to enable the jury to draw a reliable inference. It follows that if the witness is an expert in handwriting, although he has had no previous knowledge of the handwriting of the individual in question, his testimony should be admitted on the first ground. Yet it was many years before the admission of such testimony was completely established in England by statute.[6] In this country, also, although to-day in most jurisdictions such testimony is admissible with or without restriction, in many cases a statute was necessary to make it so.[7] If the witness is a non-expert who has no previous knowledge of the handwriting in question, both reasons are absent. The opinion evidence, therefore, of such a witness is justly held inadmissible.[8] But if the witness has seen writing known to be that of the individual whose writing is in dispute, his testimony should be admissible in the court's discretion for the second reason above mentioned. On principle, a proper exercise of the court's discretion would frequently result in excluding such evidence because of the accessibility of a sufficient quantity of better evidence. From the earliest days, however, in civil cases in England such testimony was always admissible from one who had seen the party write.[9] By the beginning of the nineteenth century, both in England and in this country it was admissible in criminal cases as well.[10] By this time also opinion evidence was always permitted from one who had merely seen documents known to have been written by the person in question,[11] whether the source of belief consisted in an admission, express [12] or implied,[13] or in other circumstances.[14]

When the document containing the disputed writing has been lost and the question is as to the admissibility of the opinion of a non-expert witness who has seen it, based on a comparison between his impression of the disputed writing and genuine writings in court, the testimony has ordinarily been excluded.[15] If the witness is an expert, several juris-

[6] 17 & 18 VICT. c. 125, § 27.

[7] For the state of the authorities, see 3 WIGMORE, EVIDENCE, §§ 1993, 1994, 2008, 2016.

[8] Page *v.* Homans, 14 Me. 478. See Doe *v.* Suckermore, 5 A. & E. 733, 749. There is a *dictum* opposed to this view which in terms would admit such testimony, but which, it is very probable, was not so intended. See Vinton *v.* Peck, 14 Mich. 287, 295. In Michigan and Delaware, however, a witness who has seen the party write may give an opinion from a comparison in court. McCafferty *v.* Heritage, 5 Houst. (Del.) 220; Worth *v.* McConnell, 42 Mich. 473, 4 N. W. 198. This was at one time the law in England, but has long ceased to be so. Garrells *v.* Alexander, 4 Esp. 37.

[9] Blurton *v.* Toon, Skin. 639. See Trial of the Seven Bishops, *supra.*

[10] De la Motte's Trial, 21 How. St. Trials 687, 810.

[11] See Lord Ferrers *v.* Shirley, Fitzgibbon 195, 196; Engleton *v.* Kingston, 8 Ves. 438, 474.

[12] Redd *v.* State, 65 Ark. 475, 47 S. W. 119; Hammond's Case, 2 Me. 33.

[13] See Cunningham *v.* Hudson River Bank, 21 Wend. 556, 558. For the application of the principle of implied admissions to an exchange of correspondence, see 1 WIGMORE, EVIDENCE, § 702.

[14] Commonwealth *v.* Webster, 59 Mass. 295.

[15] Putnam *v.* Wadley, 40 Ill. 346. *Cf.* Collins *v.* Ball, 82 Tex. 259, 17 S. W. 614. The decision in Bruce *v.* Crews, 39 Ga. 544, was based on the interpretation of a statute.

dictions have held the evidence admissible.[16] A recent Minnesota case admits the evidence although the witness was not an expert.[17] *Cochran* v. *Stein*, 136 N. W. 1037 (Minn.). This decision, it is submitted, takes the correct view. The witness is unable adequately to tell the jury how the lost signature looked, without expressing his opinion whether it resembles the signatures in court; and the circumstances of the case make the evidence peculiarly essential. It is not necessary to rely on the additional reason present in similar cases where the witness is an expert.

REGULATION OF RAILROAD CROSSINGS. — By virtue of the police power a state legislature enjoys a wide discretion as to the regulation of railroad crossings, which it may delegate to a commission[1] or municipal corporation.[2] This discretion will not be questioned unless abused.[3] Thus, a railroad required to maintain a crossing [4] or construct a viaduct over its tracks [5] at its own expense cannot complain that its property is taken without due process of law. Where several railroads using the same tracks have agreed with each other or with the municipality as to how the expense of such improvements shall be distributed, a different apportionment does not impair the obligation of contracts [6] or deny the equal protection of the laws.[7]

If an alteration is to be made the legislature or its delegates may dictate the plans and specifications.[8] In a recent case an ordinance requiring a railroad to build a viaduct over its tracks of sufficient additional strength to support a street railway was held valid. *Missouri Pacific Ry. Co.* v. *City of Omaha*, 197 Fed. 516 (C. C. A., Eighth Circ.). The decision seems to stand for this principle: a railroad's property is not taken for private purposes, because another company which is to benefit by the improvement is not obliged to contribute, so long as the use which this incidental beneficiary makes of the highway improvement does not exceed what the particular state can authorize as a proper exer-

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[16] Koons *v.* State, 36 Oh. St. 195; State *v.* Shinborn, 46 N. H. 497; *contra*, Hynes *v.* McDermott, 82 N. Y. 41.

[17] *Cf.* Hammond *v.* Wolf, 78 Ia. 232, 42 N. W. 778. This case was decided under a statute the material words of which were, "Evidence respecting handwriting may be given by comparison made by experts . . . with writings of the same person which are proved to be genuine." The reasoning of the opinion would seem to be equally convincing in the absence of a statute.

[1] New York and New England R. Co. *v.* Bristol, 151 U. S. 556, 14 Sup. Ct. 437.

[2] Chicago, B. & Q. R. Co. *v.* Nebraska, 170 U. S. 57, 18 Sup. Ct. 513; People *v.* Union Pacific R. Co., 20 Colo. 186, 37 Pac. 610.

[3] See New York and New England R. Co. *v.* Bristol, 151 U. S. 556, 570, 571, 14 Sup. Ct. 437, 441.

[4] Boston and Maine R. Co. *v.* York County Commissioners, 79 Me. 386, 10 Atl. 113; Chicago N. W. R. Co. *v.* Chicago, 140 Ill. 309, 29 N. E. 1109.

[5] Chicago, B. & Q. R. Co. *v.* Nebraska, *supra*; New York and New England R. Co. *v.* Bristol, *supra*.

[6] Chicago, B. & Q. R. Co. *v.* Nebraska, *supra*; Grand Trunk Western Ry. Co. *v.* Railroad Commission of Indiana, 221 U. S. 400, 31 Sup. Ct. 537.

[7] Chicago, B. & Q. R. Co. *v.* Nebraska, *supra*; Grand Trunk Western Ry. Co. *v.* Railroad Commission of Indiana, *supra*.

[8] Chicago, B. & Q. R. Co. *v.* Nebraska, *supra*; New York and New England R. Co. *v.* Bristol, *supra*; People *v.* Union Pacific R. Co., *supra*.